CHARLIE R. BIEDERMAN

IBLA 80-718 Decided January 26, 1982

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application F-14529 as to parcel B.

Set aside and remanded.

1. Alaska: Native Allotments

> Where the State Office rejects a Native allotment application because it was deficient in form and untimely filed and the applicant argues that he timely and properly filed the application, and where the factual record does not clearly support either view, the case will be remanded for a hearing.

APPEARANCES: Daniel Callahan, Esq., Alaska Legal Services Corporation, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Charlie R. Biederman has appealed the decision of the Alaska State Office, Bureau of Land Management (BLM), dated May 6, 1980, rejecting his Native allotment application F-14529 as to parcel B. The decision states initially:

> On November 11, 1971, the Bureau of Indian Affairs filed a Native Allotment Application and Evidence of Occupancy on behalf of Charlie Biederman. * * * A Parcel B was identified within protracted Secs. 2 and 11, T. 25 (no direction given), R. 32 E., Fairbanks Meridian. However, when this application was received by this office the identification for Parcel B was crossed off and initialed by the BIA certifying officer. Therefore, this office recognizes only one parcel as being officially filed by the Bureau of Indian Affairs on behalf of the applicant. On February 16, 1973, a memorandum from the Bureau of Indian Affairs was received by this office identifying a second parcel.

The decision then concludes that the Bureau of Indian Affairs' (BIA) memorandum was not the proper application form required by Departmental regulations, and that in any event it had not been filed timely.

Examination of the case file reveals the following:

1. The application was signed by appellant and dated April 12, 1971.

2. A BIA realty officer certified the application on either June 4, 1971 (date stamp), or November 3, 1971 (handwritten). The officer's name is not clear but his or her first name begins with "W," and there appears to be a middle initial "A" and a last name beginning with "N."

3. The application alleged that trapping occurred on parcel B.

4. BLM received the application from BIA on November 11, 1971.

5. The application as it now appears in the file shows that part of the description of parcel A was crossed out and changed with illegible initials noted next to the change. The entire description of parcel B was crossed out and initialed "AN" or "AM." Neither change was dated.

6. BLM prepared a typed request to Geological Survey (GS) for a minerals report on parcel A using the original description. The same correction to parcel A's description as appears on the application was handwritten on the file copy of the request.

7. In June 1972, BLM's Division of Land Office requested a field report for parcel A from the district manager.

8. On February 7, 1973, the Division of Land Office made a follow up request with the notation, "Parcel A in conflict with F-12769, ? Parcel B in PLO 3432."

9. On February 16, 1973, BLM received from BIA a legal description for parcel B, locating it in protracted sec. 36, T. 1 S., R. 32 W., Fairbanks meridian.

10. In April 1973 BLM requested a mineral report from GS on parcel B.

11. In a letter dated June 21, 1973, BLM notified appellant: "In regard to your Native Allotment application F-14529, would you please mark and post your allotment, parcels A & B, so that they can be field examined this field season."

12. BLM subsequently performed field examinations on each parcel, prepared field reports and continued to evaluate parcels A and B individually.

In his statement of reasons, appellant argues that, pursuant to Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976) and Departmental procedures established as a result of Pence, he is entitled to a hearing since facts material to the rejection of his Native allotment application are at issue. He urges that he timely filed with BIA an application for the two parcels of land. He argues that under Departmental guidelines an application filed with any agency of the Department on December 18, 1971, is considered pending before the Department as provided in the savings clause of section 18 of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976), which repealed the Alaska Native Allotment Act of 1906, 43 U.S.C. §§ 270-1 to 270-3 (1970). He urges that the record does not provide any explanation of why or when the description for parcel B was crossed off his application and asserts that he should be given the opportunity to present evidence that the corrected description for parcel B was submitted to BIA before the December 18, 1971, deadline.

[1] We agree with appellant that this case must be remanded for a hearing.

While we have no reason to doubt BLM's statement that the description for parcel B had been crossed off by BIA before BLM received the application, there is no clear evidence in the file to support that statement. An equally plausible explanation on the record before us would be that a BLM official crossed off the old description when BIA notified BLM of the change in the description in 1973. The record does not explain the circumstances of the deletion and we cannot simply assume that the 1973 BIA memorandum referring to a corrected description was a new application for parcel B, which was not timely received, rather than being an amendment to the original application. In addition, BLM's actions in evaluating parcel B are inconsistent with BLM's assertion that the application was deficient on its face.

Section 18 of the Alaska Native Claims Settlement Act, supra, repealed the Alaska Native Allotment Act, supra, as of December 18, 1971. But applications pending before the Department of the Interior on that date may be processed to patent, all else being regular. Furthermore, the Department has accepted amendments filed after December 18, 1971, to a description in an application received on or before December 18, 1971, even though the amendment resulted in relocation of the allotment if it appears that the original description arose from the inability to properly identify the site on protraction diagrams. See memorandum dated October 18, 1973, from the Assistant Secretary of the Interior, Jack O. Horton, to the Director of BLM. George Ondola, 17 IBLA 363 (1974).

Appellant is correct in his assertion that an application did not have to be pending before BLM on December 18, 1971, but rather before any agency of the Department. On the record before us, there is no clear evidence of the nature of the application initially received by BIA; when and why the application may have been changed; when BIA received the amended description; and, if the amendment was received

after December 18, 1971, whether the original description arose from the inability to properly identify the site on protraction diagrams. A hearing to determine the circumstances surrounding the filing of appellant's application is necessary. 1/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for a hearing.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Anne Poindexter Lewis
Administrative Judge

1/ Subsequent to the BLM decision in this matter Congress enacted the Alaska National Interest Lands Conservation Act (ANILCA), P.L. 96-487, 94 Stat. 2371, on Dec. 2, 1980. Section 905(a)(1) provides for the approval of Native allotment applications, with various exceptions not apparently relevant herein. However, that Act also requires that the allotment application must have been pending before the Department on Dec. 18, 1971. See Mary Ayojiak (On Reconsideration), 59 IBLA 384, 386 n.2 (1981). While section 905(c) permits amendments where "said description designates land other than that which the applicant intended to claim at the time of application" it does not permit the applicant to include other land in addition to that originally described. Thus nothing in ANILCA requires a different result in this case.